IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Case No. 78-1749

FREDDY DUANE BLAKLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

In its opposition brief, the State of Florida argued that the Petitioner failed to properly preserve the due process violation of the prosecutor's use of the Petitioner's silence in the face of repeated *Miranda* warnings, even though Petitioner objected contemporaneously four times, and moved for a mistrial in between objections. This Reply

will focus on how the federal question raised in this Petition was properly preserved for review by this Court.[1]

The federal question dealing with the due process violations of the State's use of the Petitioner's silence in the face of *Miranda* warnings was properly preserved for this Court's review. The State relies on a narrow reading out of context of portions of Justice Alderman's opinion in *Clark v. State,* 363 So.2d 331 (Fla. 1978). The State argues that in order to procedurally preserve a substantial Fifth Amendment claim, the defendant must

[1] The remaining arguments made by the State in its Opposition Brief fall of their own weight:

By giving a notice of intent to rely on an insanity defense, the Petitioner in no way relieved the State of its burden of proving every element of the offense beyond a reasonable doubt. Under Florida law, there is no such thing as a plea of not guilty by reason of insanity. *Everett* v. *State,* 97 So.2d 241 (Fla. 1957), *cert. denied,* 353 U.S. 941 (1957). See Florida Rule of Criminal Procedure 3.170(a). The Defendant entered a plea of not guilty at his arraignment. Rule 3.170(a) of the Florida Rules of Criminal Procedure states that "A plea of not guilty is a denial of every material allegation in the indictment or information upon which the defendants is to be tried." Florida requires the giving of notice of intent to rely on an insanity defense in order to allow the State to obtain discovery from the defendant's expert witnesses. By giving notice, the defendant preserves the right to present such a defense, although he may abandon it at any time, even before its presentation. A defendant giving notice of intent to rely on an insanity defense is never required to incriminate himself in order to raise such a defense, the State always having the burden of proving every element of the offense beyond a reasonable doubt. *Parking* v. *State,* 238 So.2d 817, 820 (Fla. 1970). The prosecutor himself recognized this burden in his closing argument to the jury. Tr. 397.

The State's argument that the Fifth Amendment violations were admissible since they were not used for impeachment purposes is, of course, frivolous. See *Boyer v. Patton,* 579 F.2d 284, 288 (3d Cir. 1978), and page 16 of the original Petition for Certiorari in the case at bar.

simultaneously both object and move for a mistrial, regardless of the trial court's ruling on the objection itself. The State relies in addition on *Estelle v. Williams,* 425 U.S. 501 (1976); *Wainwright v. Sykes,* 433 U.S. 72 (1977); and *Castor v. State,* 365 So.2d 701 (Fla. 1978). The State also cites *State v. Woodson,* 330 So.2d 152 (Fla. 4th DCA 1976), for the proposition that a request for a curative in

Reference to pages 17 through 19 of the original Petition for Certiorari in the case at bar will reveal that the intolerably prejudicial impact of repeatedly bringing out the Petitioner's silence after *Miranda* warning in the presence of the jury outweighed any arguable theory of relevence. Most of the considerations outlined in *Hale* and which make such silence insolubly ambiguous apply to the case at bar. The evidence simply should have gone out.

The repeated errors complained of in the Petition for Certiorari are not harmless. It cannot be said beyond a reasonable doubt that the constitutional violations did not contribute to the conviction. *Chapman v. California,* 386 U.S. 18, 23 (1967). The Court should refer to pages 19 through 20 of the original Petition for Certiori regarding the State's harmless error argument. Florida's representation to the Court that the Petitioner never challenged the sufficiency of the evidence is patently contrary to the record. In addition to the effect of the Petitioner's plea of not guilty, the Petitioner challenged the sufficency of the evidence at trial, in closing argument, and in his motion for a new trial. In his closing argument, defense counsel argued that the degree of force necessary to convict for the life felony charged necessarily involved ". . . significant force, breaking a nose and teeth, using guns and knives, as opposed to slight force." Tr. 409. The distinctions in the degree of force used make a difference between a life felony punishable by a minimum of 30 years in jail, and a lesser felony punishable by a maximum of 15 years in jail with no required minimum. The State's case regarding the degree of force used was not overwhelming, as even the Prosecutor indicated in his closing argument at pages Tr. 398 through 400. The Prosecutor stated that the only area of the case which left open a reasonable doubt was the degree of force alleged. Tr. 398. he stated, "There is no evidence of any serious physical injury, and she [the victim] didn't claim that there was." Tr. 399. The Prosecutor then discussed the appropriateness of a lesser included offense. Tr. 400.

struction must also be simultaneously made with the objection and motion for mistrial. Even a cursory reading of *Woodson* reveals that the State has misread the case.

Looking at these cases, all that is required in order to preserve a federal question for review under a contemporaneous objection rule is a timely objection which calls " . . . the matter to the court's attention so that the trial judge will have an opportunity to remedy the situation." *Estelle v. Williams,* 425 U.S. 501 508, at footnote 3 (1976). This is also the position of *Wainwright v. Sykes,* 433 U.S. 72, 88-89 (1977). *Wainwright* noted that a contemporaneous objection would also enable the record to be made with respect to the constitutional claim when the recollections of the witnesses were freshest, and would force the prosecution to take a hard look at its hole card to determine the possibility of an appellate reversal or the ultimate issuance of a federal writ of habeas corpus.

A careful reading of *Clark v. State,* 363 So. 2d 331 (Fla. 1978), reveals that a motion for mistrial need only be made if an objection is sustained. The Supreme Court of Florida noted that ". . . the important consideration is that the defendant retain primary control over the course to be followed in the event of such error." *Id.,* at 335. In other words, if the defendant objects and his objection is sustained, he is at a crossroads. He certainly has a right to a fair trail free from the pressures of constitutional error, which may conflict with his valued right to have his trial completed by the particular tribunal originally chosen. The defendant cannot have two bites at the same apple by proceeding to the end of the trial in the hopes of an acquital, and, in the event of a conviction, assume that he will prevail on appeal. If he wants a mistrial, he must move for it at that time. If he fails to do so, he will presumably have opted to complete the case with the existing jury. Further, if he wants the lesser remedy of a curative instruction, he must, under *Woods,* tell the trial judge.

If the objection is overruled, it becomes an exercize in futility to move for a mistrial, as the trial court is not realistically going to suddenly change its ruling due to the magic words of requesting a mistrial. The purpose of objection is to bring the matter to the trial court's attention and give the trial court the opportunity to prevent or correct error. As Justice Alderman noted in *Clark,* "if the court finds that there was not [improper comment on the defendant's silence], the objection should be overruled. In that event, the objection is preserved, and if the defendant is convicted, it may be raised as a point on appeal." *id.,* at 335. See also, pages 333-334. *Clark* considered two separate cases in which both defendants failed to even object. The Supreme Court of Florida held that the failure to object was the basis for refusing to grant review.

In the same year that *Clark v. State* was rendered by Justice Alderman, he wrote a concurring opinion in *Willinsky v. State,* 360 So.2d 760, 763 (Fla. 1978), which sheds light on the meaning of his *Clark* opinion as it applies to the case at bar. In *Willinsky,* the prosecutor impeached the defendant's trial testimony by asking him why he did not relate his exculpatory story at his preliminary hearing, at which prior proceeding he refused to testify. This impeachment was followed by an objection from defense counsel, which was overruled. There was no motion for a mistrial. The Supreme Court of Florida held that such a violation was fundamental error, and reversed *Willinsky's* conviction.

Justice Alderman concurred specially in the result, even though he did not feel that the error was fundamental:

> I concur in the denial of the petition for rehearing because not only was the error in the case harmful, but also, counsel for defense made a contemporaneous objection to the comment on defendant's silence, which objection was overruled by the trial court. *Id.*, at 763.

The case at bar is considerably stronger in terms of preserving the federal question than the procedure employed by *Willinsky's* defense attorney at trial. In the case at bar, two objections to the Fifth Amendment and Due Process violations were made during the proffer of the challenged testimony. The entire proffer was objected to by defense counsel on the basis of *Miranda v. Arizona.* No purpose whatsoever would have been served by simultaneously moving for a mistrial when the trial court repeatedly overruled these objections. The purpose of the contemporaneous objection rule was fully met by apprising the trial judge on four different occasions of the Petitioner's objections to this testimony. A standing objection was employed, and a motion for mistrial was made outside the presence of the jury between objections to avoid additional prejudice to Petitioner after the trial court ruled. No legitimate State interest is served by an artificial rule requiring an objection, a motion for mistrial, and request for curative instructions in the same breath, when the transcript clearly reveals that the trial court was repeatedly put on notice, and Florida has no such rule. See *Castor* v. *State,* 365 So.2d 701, 703 (Fla. 1978), for terse analysis of the contemporaneous objection rule:

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. * * * to meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal.

CONCLUSION

For the foregoing reasons in this Reply, and the reasons set forth in the main petition, the writ of certiorari should be granted and the decision below should be summarily reversed for a new trial.

Respectfully submitted,

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